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No. 08-1300

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON and
LAKE CHARLES MEMORIAL HOSPITAL,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY and
FIRST HEALTH GROUP CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FIRST HEALTH GROUP CORP.

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QUESTIONS PRESENTED

1. Whether a federal district court with diversity and federal question jurisdiction in a case filed originally in federal court has the power under the All Writs Act to enjoin parties from relitigating the issues it has conclusively decided.

2. Whether a federal district court correctly refuses to abstain from hearing a declaratory judgment action if the plaintiff's claims before it cannot be heard in a state forum due to jurisdictional limitations (this question presumes hypothetically that abstention is properly before this Court, which it is not).

3. Whether a district court may enjoin a plaintiff from relitigating the same issues it lost in federal court as part of a state proceeding (1) against a party to the federal case, and (2) against those in privity with the successful federal party.

RULE 29.6 DISCLOSURE

First Health Group Corp. is a subsidiary of Coventry Health Care, Inc., a publicly traded company whose New York Stock Exchange symbol is CVH.

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STATEMENT OF THE CASE

First Health's Preferred Provider Organization

First Health Group Corp. operates a Preferred Provider Organization. First Health's PPO essentially consists of two sets of interlocking contracts. To begin with, First Health enters into Provider Agreements with hospitals and other entities furnishing medical services under which the providers agree to accept discounted rates in return for becoming part of the First Health PPO. Second, First Health enters into agreements with health insurers and other entities responsible for providing medical care, commonly called payors, who contract with First Health for the privilege of joining its PPO and reaping the benefits of the discounted rates First Health negotiates with the providers.

First Health's PPO has worked just as intended for many years: providers benefit by obtaining increased patient volume through the PPO, payors benefit by being charged far less for the medical care for which they have to pay than they otherwise would have been charged, and patients have access to the same quality of medical care they always enjoyed. But a group of Louisiana health care providers has recently begun to challenge the propriety of First Health's PPO, arguing that (1) First Health's provider agreements are supposedly invalid under the Louisiana Any Willing Provider Act,[1] and (2) when applied to occupationally injured employees, the provider agreements are allegedly invalid because they authorize discounting provider bills below the fee schedule set forth in the Louisiana Worker's Compensation law.

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1. LSA-R.S. 40:2201 *et seq.*

Petitioners Gunderson and Lake Charles Challenge the Validity of First Health's Provider Agreements

Dr. Clark A. Gunderson and Lake Charles Memorial Hospital are two providers that entered into contracts with First Health to participate in its PPO, and both took the lead in challenging the validity of the First Health provider agreements. Gunderson and Lake Charles filed a barrage of disputed claims with the Louisiana Office of Workers' Compensation seeking, in direct breach of their Provider Agreements, additional money for medical services performed, together with penalties and attorney's fees. Gunderson and Lake Charles also instituted a class action proceeding in the Louisiana 14th Judicial District Court for the Parish of Calcasieu, seeking to certify a plaintiff class of medical providers against First Health and other defendants. In the state class action, Gunderson and Lake Charles sought to hold defendants liable for hundreds of millions of dollars in penalties and fees because of the allegedly invalid discounts taken on their medical bills (discounts taken under the very Provider Agreements they themselves signed).

Liberty Mutual Files the Current Suit to Declare the First Health Provider Agreements Valid

Liberty Mutual Insurance Company, an insurer/payor who contracted to become part of the First Health PPO, was named in many of the state workers' compensation proceedings. On November 23, 2004, Liberty Mutual filed this case in the United States District Court for the Western District of Louisiana, alleging subject matter jurisdiction based on both diversity of citizenship[2] and the existence of a federal question[3] under ERISA. Liberty Mutual specifically sought judgment against Gunderson and Lake Charles declaring that (1) the Provider Agreements negotiated between Gunderson & Lake Charles and First Health were valid and enforceable; (2) Liberty Mutual was obligated to pay Gunderson and Lake Charles no more than the negotiated rates for medical services performed; and (3) Gunderson and Lake Charles had no cause of action against Liberty Mutual. Liberty Mutual also brought a breach-of-contract claim against Gunderson and Lake Charles, alleging that it was a third party beneficiary to First Health's Provider Agreements; that Gunderson and Lake Charles had breached those agreements; and that it was accordingly entitled to damages and indemnity. On March 23, 2005, Liberty Mutual amended its Complaint to include an additional federal claim under the Contract Clause of the United States Constitution, arguing that Louisiana's Any Willing Provider Act, to the extent it supplemented or varied the terms of Liberty Mutual's contractual agreements, violated its federal constitutional rights.

2. 28 U.S.C. § 1332.

3. 28 U.S.C. § 1331.

The District Court Denies Petitioners' Abstention Request

Gunderson and Lake Charles immediately moved to dismiss Liberty Mutual's suit, arguing that the federal court should abstain in deference to the ongoing state worker's compensation proceedings. On April 13, 2005, the district court denied Gunderson and Lake Charles' motion:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule." This Court has "a strict duty to exercise the jurisdiction that is conferred upon [it] by Congress." Liberty Mutual argues that this Court has no discretion here because it is seeking damages for breach of contract in this lawsuit. In addition, in its amended complaint, Liberty Mutual alleges that Louisiana Revised Statute 40:2203.1(B) runs afoul of the constitutional prohibition against impairment of contracts. Thus Liberty Mutual maintains that the OWC's limited jurisdiction prohibits it from hearing the contract claim, and furthermore, the OWC cannot rule on constitutional issues.
>
> Liberty Mutual further cites numerous cases that hold that this court has no discretion when a plaintiff's claim is one for damages, *i.e.*, the contract claim, and the Court has a "strict" and "virtually unflagging" obligation to exercise jurisdiction over this case. Consequently, this Court will not abstain from hearing this matter.

Liberty Mutual Adds First Health as a Defendant and Both Parties Move for Summary Judgment, Placing at Issue Whether the First Health Provider Agreements are Valid

Once it successfully resisted plaintiffs' abstention request, Liberty Mutual amended its Complaint to name First Health as an additional defendant, seeking indemnification from First Health if First Health's PPO contracts created any liability on Liberty Mutual's part.

Liberty Mutual and First Health then moved for summary judgment. First Health contended it was not obligated to indemnify Liberty Mutual for amounts allegedly due to Gunderson or Lake Charles (or, for that matter, to any other health care provider that contracted with First Health) because the First Health Provider Agreements were valid and enforceable as a matter of law, and could not form the basis for liability under the terms of the Louisiana Any Willing Provider Act or any other state law. Liberty Mutual's motion agreed with First Health that the First Health Provider Agreements were completely valid, and sought a declaratory judgment that it owed Gunderson and Lake Charles no additional fees. Gunderson and Lake Charles vigorously contested these motions, filing memoranda in opposition and moving to strike First Health's summary judgment motion from the record as procedurally and legally defective.

On February 15, 2006, the district court granted First Health's and Liberty Mutual's motions for summary judgment, and shortly thereafter certified its ruling as final under Rule 54(b). In its ruling, the court

stated that the first issue was whether "the payment provision of the Provider Agreements between First Health, Gunderson, and [Lake Charles]" was "valid and enforceable." The court agreed with Liberty Mutual and First Health that the Louisiana Any Willing Provider Act did not apply because of an exemption from the statutory notice requirement for directly contracted group purchasers. The court also agreed with Liberty Mutual and First Health that the Louisiana Workers' Compensation Law did not prohibit discounting below the workers' compensation fee schedule. Lastly, based on these two foundational findings, the court determined that Liberty Mutual could never be liable for additional money owed to providers over and above the amounts called for in First Health's Provider Agreements, and accordingly granted First Health's motion for summary judgment on Liberty Mutual's indemnification demand.

Gunderson and Lake Charles appealed the court's Rule 54(b) judgment. Bizarrely, instead of addressing the issues resolved by the court and certified as final under Rule 54(b), Petitioners' brief to the Fifth Circuit Court of Appeals instead chose to argue solely that the district court should not have denied their Rule 12(b)(6) abstention motion a year earlier. Not surprisingly, on October 6, 2006 the Fifth Circuit summarily dismissed the appeal.

The District Court Enjoins Petitioners from Relitigating in State Court the Issues They Lost in Federal Court

While these issues were being fought in federal court, the parties engaged in litigation on the state front as well. As noted above, First Health and its Provider Agreements were implicated in a class action suit pending in the Louisiana 14th Judicial District Court for the Parish of Calcasieu. The named class representatives in the state action included Gunderson and Lake Charles, and the plaintiffs named First Health as a defendant. The allegations made by the plaintiff class against First Health raised several legal issues decided in the federal litigation, including (1) whether the First Health Provider Agreements were valid and enforceable under Louisiana law; (2) whether First Health was required to comply with the notice requirements under the Any Willing Provider Act; and (3) whether discounting fees for medical services rendered to occupationally ill or injured workers was permitted under Louisiana law.

Because the issue preclusion doctrine prevented Gunderson and Lake Charles from relitigating in state court issues they previously lost against First Health in federal court, on October 24, 2006, First Health moved the district court to enter a temporary restraining order, preliminary injunction, and permanent injunction against Gunderson and Lake Charles based on its February ruling in First Health's favor on the substantive issues in the federal case. Following full

briefing, on October 30, 2006, the court granted First Health's motion, and entered the following order:

> **IT IS ORDERED, ADJUDGED AND DECREED** that the Motion for Temporary Restraining Order, Preliminary and Permanent Injunction, and Stay Order filed by First Health Group Corp., be and it is hereby **GRANTED**, and pursuant to the All Writs Act, a temporary restraining order and preliminary injunction is hereby issued enjoining and preventing defendants Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital ("Defendants") from pursuing any claim before any court arising under Louisiana's Any Willing Provider Act, against First Health Group Corporation or any Payor as set forth in the provider agreements between First health and Defendants, including without limitation pursuing such claims in the matter styled *Gunderson et al v. F.A. Richard et al*, currently pending in the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

Approximately one year later, the district court considered whether it should enter a permanent injunction along similar lines. One of the key issues the district court addressed was whether it could enjoin litigation against First Health's payors, who were not formal parties to the federal proceeding. In a November 30, 2007 "Memorandum Ruling" supporting the permanent injunction, the district court determined that it could enjoin Gunderson and Lake Charles from

litigating against First Health's payors the issues that Gunderson and Lake Charles previously lost in federal court:

> To the extent that a payor had a contract with First Health that allowed for discounts to be taken for an occupationally ill/injured worker during the time period in which Dr. Gunderson or LCMH [Lake Charles] had a Provider Agreement, the Court finds that privity exists between First Health and that payor which allows said payor to be included within the scope of this injunction and/or stay. In other words, Gunderson and LCMH can not prosecute claims against any payor that had a contract with First Health . . . that involves claims for underpayment for discounting services for workers compensation patients, and/or failing to comply with the notice requirement provisions of Louisiana Revised Statutes § 40:2203.1.

Accordingly, on January 4, 2008, the court entered a permanent injunction, which prohibited Gunderson and Lake Charles from pursuing any claim "against . . . First Health Group Corp. and/or its payors which alleges that the Provider Agreements during the period from January 1, 2000 through November 30, 2004" were "invalid and/or unenforceable" under Louisiana law.

The United States Court of Appeals for the Fifth Circuit Affirms the District Court in All Respects

Dissatisfied with the district court's ruling, Gunderson and Lake Charles once again appealed to the Fifth Circuit. On November 25, 2008 the Fifth Circuit affirmed the district court's permanent injunction in all respects. The Fifth Circuit rejected Petitioners' argument that the district court lacked jurisdiction to issue an injunction under the All Writs Act, relying in part on this Court's decision in *Horton v. Liberty Mutual Ins. Co.*[4] The Fifth Circuit also found that the district court's injunction properly extended to First Health's payors:

> "Privity is a 'legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.'" . . . Liberty Mutual and other "payors" entered into Provider Agreement contracts with First Health. Liberty Mutual and First Health actively disputed Gunderson's claims that (1) the discount provisions contained in the Provider Agreements are unenforceable, and (2) that the payment provisions contained in the Provider Agreements do not apply to group purchasers or to agreements of group purchasers. The contractual relationship between First Health and its payors, as well as the identical litigation position against

4. 367 U.S. 348 (1961).

> Gunderson in suits over these contractual provisions, evidence to this Court that First Health and its "payors" are in privity with Liberty Mutual.

In a similar vein, the Fifth Circuit rejected Petitioners' claim that the injunction was fatally flawed by not specifically identifying which "payors" it covered, holding:

> The district court correctly noted that the Provider Agreements between First Health and Gunderson required First Health to provide a payor listing to Gunderson. First Health complied with these requirements, and provided Gunderson with payor listings. Therefore, this Court holds that the permanent injunction is framed in a manner that enables Gunderson to know what conduct the district court prohibited.

One issue the Fifth Circuit did ***not*** address was abstention. Abstention was not addressed in the district court's final summary judgment or injunction rulings, and therefore was not an issue on appeal.

REASONS FOR DENYING THE PETITION

To their credit, Petitioners' application does not try to manufacture a false circuit conflict over the issues they present. Aware of the deficiencies in their arguments, Petitioners instead try to pique the Court's interest by leading off with a silly rhyme parodying Dr. Seuss' *Horton Hears a Who!*, and proceed to muddy the clear waters of this case by invoking a variety of questionable (if not outright wrong) legal theories.[5] Not to be a Grinch, but First Health submits that the lower courts properly stated the rules of law applicable to this case, and correctly applied those rules. There is no reason to grant certiorari.

1. The Fifth Circuit correctly found that the district court possessed subject matter jurisdiction, and could therefore enjoin Petitioners under the All Writs Act from relitigating issues in state court they had already lost in federal court.

The All Writs Act[6] gives federal courts the power to enjoin parties from prosecuting state court actions involving issues they previous lost in federal court.[7] This sort of injunction does not violate the Anti-Injunction Act[8] because it is entered "to protect or effectuate" a

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5. *See generally* Theodor S. Geisel, *Horton Hears a Who!* (1954).

6. 28 U.S.C. § 1651(a).

7. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003).

8. 28 U.S.C. § 2283.

federal court judgment; indeed, the power to enjoin state proceedings under the All Writs Act "dovetails with the relitigation exception to the Anti-Injunction Act which, although generally prohibiting federal courts from enjoining state proceedings, permits a court to enjoin a state court 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'"[9]

Petitioners don't question these principles, and instead argue that one key requirement of an All-Writs-Act injunction, subject matter jurisdiction, was missing.[10] But how can Petitioners manufacture a lack-of-subject-matter-jurisdiction argument, considering that the district court had both diversity and federal question jurisdiction? They do so by turning this Court's precedent (principally *Horton v. Liberty Mutual Ins.*

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9. *Vasquez*, 325 F.3d at 675.

10. Petitioners mistakenly argue that Louisiana law, not federal law, governs the requirements for an All-Writs-Act injunction based on the preclusive effect of the court's ruling, relying on this Court's decision in *Semtek Int'l Inc. v. Lockheed-Martin Corp*, 531 U.S. 497 (2001). Because federal and state law both require that the court issuing the first ruling possess subject matter jurisdiction, this is a distinction without a difference. Nevertheless, to be precise, federal law governs. *Semtek* directs that state preclusion law applies only if the district court's jurisdiction is based on diversity, and subject matter jurisdiction in this case rested on both diversity and the existence of a federal question. Further, *Semtek* recognized that "in situations in which the state law is incompatible with federal interests," federal law governs the preclusive effect of a prior federal order even if jurisdiction was based solely on diversity. The current case presents just such a situation.

Co.[11]) on its head. Petitioners argue that because they had instituted claims against Liberty Mutual in the Louisiana Office of Worker's Compensation before Liberty Mutual brought its declaratory judgment action, Liberty Mutual's declaratory complaint "effectively removed" the worker's compensation claims.

This is utter nonsense. To begin with, factually, there was no removal; even after Liberty Mutual filed its declaratory judgment complaint in federal court, the state proceedings remained pending in the state worker's compensation office. More to the point, there is no jurisprudence — ***none*** — authorizing or recognizing the concept of "effective removal" on these facts, and Petitioners certainly don't cite any. Recognizing this fatal problem, Petitioners mask their lack of support by instead arguing that *Horton*, the case relied upon by the Fifth Circuit in affirming the district court, should not be "expanded" to permit the federal court to "usurp pending state worker's compensation actions by way of a declaratory judgment."

The problem here is that the district court's jurisdiction (and, hence, its authority to issue an All-Writs-Act injunction) isn't based on *Horton* or any other case; it is simply derived from the fact that the court possessed valid diversity[12] and federal

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11. 367 U.S. 348 (1961).

12. Liberty Mutual is a citizen of Massachusetts; Gunderson and Lake Charles are citizens of Louisiana; and First Health is a citizen of Delaware and Maryland. Further, the amount in controversy requirement for diversity has always

(Cont'd)

question[13] jurisdiction. But to the extent that *Horton* is relevant to this case, it amply supports the Fifth Circuit's conclusion. The *Horton* plaintiff was injured while working in Texas, and the Texas workers' compensation tribunal awarded him $1,050.00. This award satisfied no one; Horton's employer filed suit in federal court to set aside the award in its entirety, and Horton filed an appeal in Texas state court to increase the amount of the award. Horton then moved to dismiss the federal suit, arguing that the federal court lacked jurisdiction because of the then-recently-enacted statutory prohibition against the removal of worker's compensation cases.[14] The district court agreed, and dismissed the suit; but the Fifth Circuit reversed. In affirming the Fifth Circuit, this Court concluded:

> The foregoing [burdens to workers' compensation plaintiffs in having to litigate in federal court] are some of the appealing considerations that led the District Court to conclude that it would frustrate the

(Cont'd)

been present because Gunderson contended he was due more than $76,000 in additional monies from Liberty Mutual, and Lake Charles contended it was due more than $3,000,000. Accordingly, each of the requirements of § 1332 is satisfied.

13. Liberty Mutual alleged in its Complaint that federal question jurisdiction exists when an area of the law is completely preempted (*see, e.g., Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997)), and that ERISA preempted Gunderson's and Lake Charles' claims. Additionally, its First Amended Complaint raised a claim under the Contract Clause of the United States Constitution. Either of these claims sufficed to provide federal question jurisdiction under § 1331.

14. 28 U.S.C. § 1445(c).

> congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. **But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings, Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount.** In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still. We therefore hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.[15]

Horton, then, unremarkably held that a federal district court that possesses subject matter jurisdiction can

15. *Id.* at 352 (emphasis added).

entertain a challenge to a state worker's compensation award. Petitioners try to transmogrify *Horton* into standing for the proposition that if there is an ongoing worker's compensation proceeding (instead of a proceeding that has concluded at the trial level), a federal district court cannot entertain a declaratory judgment action affecting that proceeding, even if it unquestionably possesses subject matter jurisdiction. And ***that*** proposition is made up out of whole cloth by Petitioners — it appears nowhere in *Horton* or any other governing decision.

Indeed, this case is similar to *St. Paul Ins. Co. v. Trejo*,[16] which analyzed the meaning of *Horton* and flatly rejected Petitioners' reading of it. The *Trejo* plaintiff successfully convinced a district court to dismiss a federal declaratory judgment action under some sort of "effective removal" theory, relying on a defendant's statutory inability to remove workers' compensation cases. The Fifth Circuit reversed the district court's dismissal of the declaratory judgment action:

> Although the district court acknowledged that St. Paul's lawsuit had not been removed, it nevertheless concluded that the federalism concerns underlying section 1445(c) allowed the lawsuit to be dismissed. The district court reasoned that since St. Paul's lawsuit involved a request for a declaration of rights under a worker's compensation award it was a lawsuit "arising under" the Texas worker's compensation laws. And it concluded that

16. 39 F.3d 585 (5th Cir. 1994).

retaining jurisdiction of the case would thus thwart the congressional purpose behind section 1445(c).

The Supreme Court's decision in *Horton v. Liberty Mutual Ins. Co.* speaks directly to this question. In *Horton*, Liberty Mutual filed a federal lawsuit, on the basis of diversity of citizenship, to set aside a worker's compensation award granted by a state administrative board. Thereafter, Horton filed his own action in state court and then moved for dismissal of the federal lawsuit on jurisdictional grounds. In *Horton*, the Supreme Court held that federal jurisdiction was not barred by the 1958 amendment to Title 28 (now section 1445(c)), which forbade the removal of state worker's compensation cases. The Court observed that while the purposes of the 1958 amendment, such as limiting federal court congestion and eliminating the burdens that worker's compensation claimants might suffer, militated against the exercise of jurisdiction, the amendment did not specifically prohibit jurisdiction in worker's compensation cases which were originally filed in federal court. Further, the Court noted that "Congress used language specifically barring *removal* of such cases from state to federal courts [but] left unchanged the old language which . . . specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed

> jurisdictional amount." The *Horton* court concluded that "we must take the intent of Congress with regard to the filing of diversity cases in federal district courts to be that which its language clearly sets forth."
>
> In accordance with *Horton*, even though St. Paul's declaratory judgment action involved a state workers' compensation law, jurisdiction was still proper based on diversity of citizenship. We accordingly hold that the district court erred in dismissing St. Paul's suit on the basis of section 1445(c) or its purposes.[17]

Predictably, Petitioners conclude their "effective removal" argument by trotting out a parade of horribles that will supposedly occur if the Fifth Circuit's decision stands; Petitioners argue that any worker's compensation party could file a declaratory judgment action in federal court and usurp the state proceedings. But that will never happen. At the very least, abstention will prevent almost all of this sort of case from being heard in federal court, and abstention did not apply to this proceeding only because Liberty Mutual raised

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17. *Id.* at 587-88 (italics in original; citations omitted); *see also Prescott v. United States*, 523 F. Supp. 918, 939 (D. Nev. 1981) ("It is well-settled that although Title 28 U.S.C. Section 1445(c) prevents workmen's compensation suits from being removed to federal court if filed by claimants in state courts, such suits may still be filed in federal court pursuant to Title 28 U.S.C. Section 1332 if there is diversity of citizenship" and the jurisdictional amount is satisfied), *aff'd on other grounds*, 731 F.2d 1388 (9th Cir. 1984).

breach-of-contract and constitutional claims that were outside the jurisdiction of the state worker's compensation tribunal.

2. **Although abstention is not even properly before this Court, the district court correctly determined that it did not have to abstain, considering that plaintiff Liberty Mutual's claims could not have been brought in a Louisiana worker's compensation tribunal.**

This Court should not even address the merits of Petitioners' abstention argument, which is not properly before it. As noted above, abstention was addressed by the district court when it denied Petitioners' motion to dismiss in August 2005. But this writ application is from the Fifth Circuit's November 2008 ruling, which in turn was an appeal only from the district court's grant of First Health's request for injunctive relief based on the its successful summary judgment motion, a judgment long ago certified as final by the district court and as to which Petitioners failed to appeal. Abstention was neither argued to the Fifth Circuit on this appeal, nor addressed in its ruling. Accordingly, this Court should not take it up either.[18]

And what of the merits? The key issue here is that the instant lawsuit is not simply one for declaratory relief. Liberty Mutual coupled its declaratory judgment request with a claim for damages for breach of contract,

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18. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this court will not ordinarily consider them.").

as well as a claim for relief under the Contract Clause of the United States Constitution. When an action involves a demand for monetary or other relief, the propriety of abstention is governed by the "exceptional circumstances" standard articulated in *Colorado River Water Conservation District v. United States.*[19] Under *Colorado River*, a prime factor to consider is whether the state proceedings are inadequate to protect the federal plaintiff's rights.[20] As the district court correctly noted, the Louisiana Office of Workers' Compensation certainly cannot address federal constitutional claims, nor does it possess jurisdiction to award breach-of-contract damages to Liberty Mutual. Indeed, the Supreme Court of Louisiana addressed this very issue only six months ago, holding that "the [worker's compensation] Act does not govern or otherwise regulate contracts between employers, insurers, and owners of PPO networks. Disputes involving contracts between such parties do not 'arise out of' the Act, even where the relevant claims involve the payment of third party medical bills required under the Act."[21] Gunderson and Lake Charles do not seriously argue otherwise, noting only that Liberty Mutual's breach of contract and constitutional claims were supposedly frivolous. But the district court never dismissed these claims, and they remain pending to this day. Gunderson and Lake Charles' own self-serving belief that these claims are meritless is irrelevant; by raising claims outside the

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19. 424 U.S. 800 (1976).

20. *Id.* at 818.

21. *Broussard Physical Therapy v. Family Dollar Stores, Inc.*, 08-1013 (La. 12/2/08); 5 So. 2d 812, 817.

jurisdiction of the workers' compensation tribunal, Liberty Mutual divested the district court of the ability to abstain.

3. The Fifth Circuit correctly affirmed the district court's grant of injunctive relief, which prohibited Petitioners from relitigating the issues they lost in federal court against First Health's payors.

Petitioners' final argument is that they were somehow deprived of due process when the district court entered an injunction against their potential relitigation of the issues they lost in federal court against First Health's payors. Citing *Taylor v. Sturgell*,[22] Petitioners complain that the injunction violates their due process rights because these payors were "unnamed, unidentified, and in no way involved in this litigation." But is this really the case?

To begin with, Gunderson and Lake Charles' entire argument is disingenuous. There is no question that federal collateral estoppel, which governs the preclusive effect of the federal district court's rulings in this case,[23]

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22. 128 S.Ct. 2161 (2008).

23. *See* footnote 10 above. Although Petitioners argue that Louisiana collateral estoppel law is narrower than its federal counterpart, federal law applies, despite the holding of *Semtek*, because (1) the district court's jurisdiction was based, at least in part, on the existence of two federal questions; and (2) the federal issue involved (protecting the efficacy of a federal judgment against potential relitigation by the losing party in state court) is of paramount federal importance.

does not require mutuality, and First Health's payors could defend themselves in state court by invoking collateral estoppel defensively as a shield to a lawsuit instituted against them by Gunderson or Lake Charles.[24] Gunderson and Lake Charles vigorously litigated the validity of the First Health Provider Agreements with First Health, and lost; this loss prevents them, under collateral estoppel, from now suing the other parties to the Provider Agreements in state court. All the district court did was save the time, energy, and expense of forcing hundreds of payors to face the prospect of having to raise collateral estoppel in hundreds of potential cases involving the same issues it conclusively resolved. *Taylor* does not apply to these facts; if it did, the entire federal law of issue preclusion would have to be rewritten.

Even if *Taylor* has some relevance, the district court's injunction would still be perfectly acceptable. *Taylor* recognized that the general principle of nonparty preclusion is subject to exceptions.[25] One of these exceptions is "adequate representation," which refers to a nonparty being "'adequately represented by someone with the same interests who [wa]s a party' to the suit."[26] In this case, both First Health and Liberty Mutual adequately represented the absent payors.

To begin with, First Health's contracted payors enjoyed a sufficiently close legal relationship with First

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24. *United States v. Mendoza*, 464 U.S. 154, 159 (1984).

25. *Taylor*, 128 S. Ct. at 2167.

26. *Id.*

Health to justify the district court's discretionary decision to enjoin Gunderson and Lake Charles from pursuing claims against them. First Health litigated the issue of the validity of its Provider Agreements with Gunderson and Lake Charles, and litigated the issue of whether or not this contractual relationship gave rise to any issue of notice under La. R.S. 40:2203.1 *et seq.* Gunderson and Lake Charles lost their arguments on these issues; the district court properly recognized that these entities should not be permitted to relitigate the validity of their Provider Agreement with First Health simply by substituting a different First Health payor client as a party. Any such claims would be purely derivative of the Provider Agreements the district court determined were valid and enforceable under Louisiana law, and would seek to impose liability based on the payor's failure to give the notice the lower court determined was not required under the law. Because First Health, one of the parties to the bilateral Provider Agreements, successively defeated Gunderson and Lake Charles' best efforts to invalidate them, the other parties to the bilateral agreements should not now face the prospect of having to defend them all over again.

In reality, it was First Health that had the most to lose if the Provider Agreements fell, and no payor could have litigated the issues more strenuously than First Health. First Health was the litigant who ***should*** have defended the agreements, not the payors, and it was both permissible and sensible to include the payors within the scope of the injunction: the payors were represented by First Health, had the same litigation posture, and were parties to the same agreements First Health championed.

Moreover, the absent payors were well represented by Liberty Mutual, itself a contracted payor to the First Health preferred provider network. The source of the rights and obligations of the absent payors was precisely the same as those of Liberty Mutual; the First Health Provider Agreements are, in all relevant respects, identical. Liberty Mutual vigorously defended the agreement to which it is a party, just as any payor would have done. Unless the district court enjoined litigation against the other First Health payors, the prospect existed that Gunderson and Lake Charles could forum shop until they found a court willing to accept their arguments (or found a payor which lacked the financial resources to fight tooth and nail with them, as Liberty Mutual did), get a judgment against that payor, and try to then use that judgment offensively against the other payors. This is exactly the kind of inconsistency of rulings, bringing with it the possible tension between the federal and state systems, that an All-Writs-Act injunction based on preclusion is designed to prevent.

What is more, as the Fifth Circuit recognized, the Provider Agreements imposed an obligation on First Health to provide a payor listing to both Gunderson and Lake Charles. At no time did Gunderson or Lake Charles contest that First Health discharged its obligation to furnish payor listings, rendering any professed confusion about the scope of the injunction mere sophistry.

CONCLUSION

Petitioners cannot establish any compelling reason for this Court to grant certiorari. First Health therefore respectfully requests that the Petition be denied.

Respectfully submitted,

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